Supreme Court, U.S.
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No. 93-723

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

X-CITEMENT VIDEO, INC., AND RUBIN GOTTESMAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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I. In order to prevail in this case, respondents must do more than demonstrate that 18 U.S.C. 2252 is ambiguous with respect to the question whether knowledge of a performer's minority is an essential element of the distribution offense. They must demonstrate that Congress's intent not to require scienter is so clear as to overcome both the "background assumption of our criminal law," that scienter is required, *Liparota* v. *United States*, 471 U.S. 419, 426 (1985), and the principle that federal courts will "construe [a] statute to avoid [constitutional] problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988).

Respondents have fallen far short of making that sort of showing.

Respondents acknowledge that "criminal statutes ordinarily are presumed to require scienter." Resp. Br. 29. They argue, however, that "[i]n this case, Congress has deliberately and unequivocally excluded knowledge of minority * * * as an element of the crime," *id.* at 30-31, and that Section 2252 therefore is unconstitutional. Neither the text nor the history of Section 2252 supports that contention, and no other court of appeals has accepted it.[1]

A. Respondents first argue that the word "knowingly" cannot be read to refer to the phrase "minor engaging in sexual conduct" because the latter "occurs in an independent clause set off by indentations and in outline form." Resp. Br. 15-16.[2] As we explain in our opening

[1] We note that several courts of appeals have considered constitutional challenges to Section 2252 after the Ninth Circuit issued its decision in the instant case. Those courts have varied significantly in their reasoning (and in their articulation of the scienter requirement), but all have expressly declined to follow the Ninth Circuit and have upheld the statute against constitutional attack. See *United States* v. *Gendron*, 18 F.3d 955, 957-960 (1st Cir. 1994), petition for cert. pending, No. 93-9593; *United States* v. *Gifford*, 17 F.3d 462, 471-473 (1st Cir. 1994); *United States* v. *Colavito*, 19 F.3d 69, 70-71 (2d Cir. 1994), petition for cert. pending, No. 93-8815; *United States* v. *Cochran*, 17 F.3d 56, 58-61 (3d Cir. 1994), petition for cert. pending, No. 93-8697; *United States* v. *Burian*, 19 F.3d 188, 190-191 (5th Cir. 1994); *United States* v. *Schmeltzer*, 20 F.3d 610, 612 (5th Cir. 1994), petition for cert. pending, No. 93-9244; *United States* v. *Brown*, No. 93-5677 (6th Cir. May 26, 1994).

[2] Similarly, amicus curiae Law and Linguistics Consortium, relying upon the grammatical structure of Section 2252, argues that "according to principles of standard English" the word

brief, however, the legislative history affirmatively indicates that the word "knowingly" in Section 2252 was intended to refer to the minority of the performer. See Gov't Br. 18, 28, 36-37. In any event, the presumption that criminal statutes "require some kind of guilty knowledge with respect to major wrong-creating elements of major crimes," *United States* v. *Gendron*, 18 F.3d 955, 958 (1st Cir. 1994), petition for cert. pending, No. 93-9593, would apply even if the word "knowingly" did not appear in Section 2252 at all, since "far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 438 (1978).

Respondents shrink, it should be noted, from the logical implications of their grammatical analysis. The elements of minority of the performer and sexually explicit conduct are both contained in the same subclause of 18 U.S.C. 2252(a)(1) and (2)—indeed, as part of the same prepositional phrase ("of a minor engaging in sexually explicit conduct") in each subclause.[3] If the

"knowingly" cannot properly be taken to refer to the minority of the model or performer. Amicus Br. 3; see *id.* at 6-7.

[3] At the time of the acts alleged in the indictment, 18 U.S.C. 2252(a)(1) (1988) established criminal penalties applicable to

> (a) Any person who —
>
> (1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct[.]

grammatical structure of Section 2252 precludes application of the knowledge requirement to the minority of the performer, that structure would also appear to preclude application of the knowledge requirement to the presence of "sexually explicit conduct." See Gov't Br. 41.[4] So construed, Section 2252's severe criminal penalties would apply to transporters (including common carriers), distributors, and receivers who lacked any knowledge of the contents of proscribed visual depictions. Not surprisingly, respondents do not assert that Congress intended to enact a provision of such sweep and doubtful constitutionality. See *Smith* v. *California*, 361 U.S. 147, 153-154 (1959). To the contrary, they rely heavily on legislative history indicating that knowledge of sexually explicit content *is* an element of the distribution offense. See Resp. Br. 18-20. Respondents make no effort, however, to address the contradiction between their linguistic and legislative history arguments.

Respondents also rely (Resp. Br. 15) on *United States* v. *Yermian*, 468 U.S. 63 (1984). The Court there construed 18 U.S.C. 1001, which establishes criminal penalties for any person who "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully * * * makes any false,

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Section 2252(a)(2) was similarly structured and applied to the receipt or distribution of such materials.

[4] Respondents agree with this reading of the text of 18 U.S.C. 2252. See Resp. Br. 15 ("Grammatically, the adverb 'knowingly' used in section 2252(a)(1) modifies the verbs 'transports' and 'ships,' the interstate nexus requirement, and the phrase 'visual depiction.'"). Similarly, amicus curiae Law and Linguistics Consortium states that "[t]he sentence in the statute requires knowledge of the act of transportation and arguably knowledge that the object transported is a depiction." Amicus Br. 7.

fictitious or fraudulent statements or representations." The Court held that "the terms 'knowingly and willfully' modify only the making of 'false, fictitious or fraudulent statements,' and not the predicate circumstance that those statements be made in a matter within the jurisdiction of a federal agency." 468 U.S. at 69. Petitioners' reliance on *Yermian* is misplaced, however, because the Court in that case expressly noted that "[j]urisdictional language need not contain the same culpability requirement as other elements of the offense," *id.* at 68, and because the jurisdictional language appeared in a phrase that was separate from (and preceded) the portion of the statutory text that was introduced by the scienter terms "knowingly and willfully." *Id.* at 69. In addition, as this Court subsequently explained, all parties in *Yermian* agreed that a conviction under Section 1001 "required proof at least that the defendant 'knowingly and willfully' made a false statement," and thus "agreed that the Government had to prove the defendant's *mens rea*." *Liparota*, 471 U.S. at 432. Under Section 2252, by contrast, the minority of a particular performer may be the fact that separates criminal acts from conduct that is constitutionally protected. *Yermian* does not cast doubt upon the principle that criminal statutes are presumed to require scienter with respect to such a fundamentally dispositive fact.

B. Respondents also contend that the legislative history demonstrates an intent by Congress not to require knowledge of minority in prosecutions brought under Section 2252. See Resp. Br. 18-23. They rely in particular on Assistant Attorney General Wald's suggestion that "[t]o clarify the situation, the legislative history might reflect that the defendant's knowledge of the age of the child is not an element of the [Section

2252] offense." S. Rep. No. 438, 95th Cong., 1st Sess. 29 (1977) (*quoted at* Resp. Br. 19-20). Assistant Attorney General Wald did not state, however, that the bill as written would be given that construction; rather, she recommended that legislative history to that effect should be produced in order "[t]o clarify the situation." *Ibid.* No such history was ever developed. See *United States* v. *Gendron*, 18 F.3d at 960 ("We have found nothing in the statute or the legislative history * * * to suggest that Congress adopted [Assistant Attorney General Wald's] recommendation."). To the contrary, Senator Roth—who introduced an amendment reinstating the distribution offense after Section 2252 was excised from the bill by the Senate Judiciary Committee—expressed the view that Section 2252, "limited as it is by the phrase 'knowingly,' insures that only those sellers and distributors who are consciously and deliberately engaged in the marketing of child pornography * * * are subject to prosecution." 123 Cong. Rec. 33,050 (1977); see Gov't Br. 26-28.

Respondents contend that "[t]he conference committee accepted Ms. Wald's recommendation 'with the intent that it is not a necessary element of a prosecution that the defendant know the actual age of the child.' H.R. Rep. No. 811, 95th Cong., 1st Sess. 5 (1977) [Conference Report]." Resp. Br. 20. Read in context, however, the quoted portion of the Conference Report supports, rather than undermines, the conclusion that knowledge of minority is required under Section 2252. The full passage is as follows:

> The Senate bill contains an express requirement in proposed section 2251(a) that the crime be committed 'knowingly.' The House amendment does not. The conference substitute accepts the House provision with the intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child.

H.R. Conf. Rep. No. 811, 95th Cong., 1st Sess. 5 (1977). The passage quoted by respondents thus clearly deals with Section 2251 rather than Section 2252. The Conference Report does not directly address the question whether knowledge of minority is a necessary element of the distribution offense under Section 2252. The Report demonstrates, however, that the word "knowingly" was deleted from Section 2251 for the specific purpose of making clear that knowledge of minority is not required to establish an offense under that Section. See H.R. Conf. Rep. No. 811, *supra*, at 5; see also H.R. Rep. No. 696, 95th Cong., 1st Sess. 12 (1977) (explaining that the word "knowingly" was deleted from the House version of Section 2251 "at the suggestion of the Department of Justice. * * * It is not the intention of the committee to require the Government to prove the defendant knew the child was under age 16."). Congress's simultaneous retention of the word "knowingly" in Section 2252 surely implies that knowledge of minority was intended to be a necessary element of the distribution offense.

Against this backdrop, we are perplexed by respondents' assertion that "[k]nowledge of minority was deliberately excluded from sections 2251 and 2252," and that "[t]he Government's argument that the phrase was deliberately omitted from section 2251, but accidentally omitted from section 2252, finds no support in the text of the section or its legislative history." Resp. Br. 30. Our contention that knowledge of minority is not required under Section 2251 is based on the deletion of the word "knowingly" from that provision and on the

Conference and House Reports' express statement that such knowledge is not an element of the production offense. Neither of those factors applies to Section 2252.[5]

Nor was there anything illogical about Congress's decision to require knowledge of minority in Section 2252 prosecutions but not in those brought under Section 2251.[6] As we point out in our opening brief (see Gov't Br. 20-21 & n.14), distributors and receivers of visual depictions may lack practical means of reliably determining the ages of performers with whom they have no direct contact. Imposition of criminal liability on those

[5] In arguing that "[t]he critical language used in sections 2251 and 2252 is identical" (Resp. Br. 21), respondents rely on Section 2251(c)(1). That provision establishes criminal penalties for any person who "knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct." The House Report accompanying that provision states that "[t]he government must prove that the defendant knew the character of the visual depictions as depicting a minor engaging in sexually explicit conduct but need not prove that the defendant actually knew the person depicted was in fact under 18 years of age or that the depictions violated Federal law." H.R. Rep. No. 910, 99th Cong., 2d Sess. 6 (1986).

Section 2251(c) was added to the statute in 1986, see Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 2, 100 Stat. 3510, and therefore it sheds little light on the proper construction of Section 2252. Moreover, Section 2251(c) is something of an anomaly, since it applies to advertisements both to produce and to receive proscribed materials.

[6] In particular, there is no basis for respondents' assertion that by contending that Section 2251 does not require knowledge of minority, the government "implicitly acknowledges that section 2251 is therefore unconstitutional." Resp. Br. 10.

who lack knowledge of a performer's minority might chill the distribution and receipt of non-obscene materials that in fact do not depict underage performers and are therefore constitutionally protected. Cf. *Smith* v. *California*, 361 U.S. 147, 153-154 (1959). No similar chilling effect is likely to follow from Congress's decision not to require knowledge of minority under Section 2251, since "producers are in a position to know or learn the ages of their employees." *United States* v. *United States District Court for Central District of California*, 858 F.2d 534, 543 n.6 (9th Cir. 1988).

C. In our opening brief we argue that, even if Section 2252 as enacted in 1978 would not have been construed to require knowledge of minority, the statute in its current form should be so construed. See Gov't Br. 37-39. Respondents argue that amendments to Section 2252 enacted in 1984 could not have altered the applicable scienter requirements; they rely primarily on the fact that "the 1984 amendments were silent concerning the word 'knowledge.'" Resp. Br. 23.[7] We acknowledge that

[7] Respondents also contend that "section 2252 had been authoritatively construed as not requiring knowledge of minority * * * prior to the 1984 amendments." Resp. Br. 24 (citing *United States* v. *Langford*, 688 F.2d 1088 (7th Cir. 1982), cert. denied, 461 U.S. 959 (1983)). Respondents considerably overstate the significance of *Langford*. The Seventh Circuit opinion in that case contains a footnote describing jury instructions given by the district court, and those instructions contain no reference to knowledge of minority. See 688 F.2d at 1089 n.1 (*quoted at* Resp. Br. 17 n.6). The defendant apparently did not raise the issue of scienter, however, and the Seventh Circuit did not address it. There is consequently no basis for respondents' assertions that the court in *Langford* "authoritatively construed" the statute not to require knowledge of minority.

Respondents contend as well that the 1984 amendments cannot be construed to impose a new knowledge requirement because "the

neither the 1984 amendments nor their legislative history directly addresses the question whether knowledge of minority is required under Section 2252. The applicability of established canons of statutory construction, however, does not depend upon express congressional references to their operation. Nor is there anything novel about the proposition that amendments to one portion of a statutory provision may alter the manner in which the provision as a whole is applied. By deleting the word "obscene" from Section 2252, and thereby extending its reach to non-obscene materials, the 1984 amendments changed the minority of the child performer from a fact that could enhance a defendant's sentence to a fact that separates lawful from unlawful conduct. See Gov't Br. 38. That change rendered applicable the presumption that a criminal defendant must ordinarily "know the facts that make his conduct illegal," *Staples* v. *United States*, 114 S. Ct. 1793, 1797 (1994)—a canon of construction that does not apply to facts bearing only on the severity of a defendant's sentence. See Gov't Br. 15-16 & n.10.[8] In the absence of

changes made in 1984 all had the purpose of making it easier for the prosecutor to obtain a conviction." Resp. Br. 23. But because the absence of any scienter requirement as to minority would raise grave questions concerning the constitutionality of Section 2252 as applied to non-obscene materials, recognition of a scienter requirement can surely be characterized as "making it easier for the prosecutor to obtain a conviction."

[8] In the original version of Section 2252, the word "obscene" modified "visual or print medium" (now "visual depiction") in the introductory clause of both subsection (a)(1) and subsection (a)(2). See Pub. L. No. 95-225, § 2(a), 92 Stat. 7-8. It seems clear as a purely grammatical matter that the word "knowingly" applied to the word "obscene," with the result that the government would have been required to show that the defendants knew the facts about the visual or print medium that rendered it obscene.

persuasive evidence of congressional intent rebutting that presumption, Section 2252 in its current form should therefore be read to require knowledge of minority, regardless of whether such knowledge would have been required when the statute was first enacted.

II. Respondents also argue (Resp. Br. 31-38) that the judgment of the court of appeals should be affirmed on any of three alternative grounds: (1) that 18 U.S.C. 2256(2)(E) (defining "sexually explicit conduct" to include "actual or simulated * * * lascivious exhibition of the genitals or pubic area") is vague and overbroad; (2) that 18 U.S.C. 2256(2)(D) (defining "sexually explicit conduct" to include "actual or simulated * * * sadistic or masochistic abuse") is vague and overbroad; and (3) that 18 U.S.C. 2256(1) (defining "minor" to include "any person under the age of 18 years") sweeps more broadly than is necessary to serve the ends of the statute. The court of appeals rejected each of those contentions. See Pet. App. 5a-8a. Although this Court has jurisdiction to consider those arguments, see *Dandridge* v. *Williams*, 397 U.S. 471, 475-476 n.6 (1970), the Court may decline to entertain them "[i]n the absence of a strong suggestion of an abuse of [the lower court's] discretion or an indication that the issues are of sufficient general importance to justify the grant of certiorari." *United States* v. *Nobles*, 422 U.S. 225, 242 n.16 (1975). Respondents have failed to identify any conflict among the circuits on these issues or any other consideration justifying this Court's plenary review—especially since respondents failed to identify the issues as alternative grounds for affirmance in their response to the certiorari petition. See *City of Oklahoma City* v. *Tuttle*,

471 U.S. 808, 815 (1985). In any event, respondents' arguments are without merit.[9]

A. As the court of appeals concluded, respondents' challenges to Sections 2256(2)(D) and (E) were "essentially answered in *Ferber*, which upheld the constitutionality of a similar statute." Pet. App. 7a. The statute at issue in *New York* v. *Ferber*, 458 U.S. 747 (1982), defined "sexual conduct" to include "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." *Id.* at 751. This Court held that the statute "incorporate[d] a definition of sexual conduct that comports with" applicable constitutional principles and "sufficiently describe[d] a category of material the production and distribution of which is not entitled to First Amendment protection." *Id.* at 765.

As the court of appeals noted (see Pet. App. 8a), there is no meaningful distinction between the terms "sado-masochistic abuse" (in the New York statute) and "sadistic or masochistic abuse" (in Section 2256(2)(D)). The word "lascivious" (in Section 2256(2)(E)) was substituted for "lewd" in 1984 in order "to make it clear that an exhibition of a child's genitals does not have to meet the obscenity standard to be unlawful." See 130 Cong. Rec. 7196 (1984) (remarks of Sen. Specter). The courts of appeals have uniformly rejected the contention

[9] Respondents also argue (Resp. Br. 38-39) that the indictment in this case was fatally defective, and that the tapes in question did not constitute "child pornography." As respondents point out, the Ninth Circuit did not reach those issues. See Pet. App. 4a-5a & n.3. Although we believe that those contentions are meritless and that respondents' convictions should ultimately be affirmed, we agree that if this Court reverses the judgment of the Ninth Circuit, the case should be remanded to permit the court of appeals to consider the issues on which it has not yet ruled.

that this change rendered the statute vague or overbroad. See, *e.g.*, *United States* v. *Wiegand*, 812 F.2d 1239, 1243-1244 (9th Cir.), cert. denied, 484 U.S. 856 (1987); *United States* v. *O'Malley*, 854 F.2d 1085, 1086-1087 (8th Cir. 1988); *United States* v. *Reedy*, 845 F.2d 239, 241 (10th Cir. 1988), cert. denied, 489 U.S. 1055 (1989); *United States* v. *Rubio*, 834 F.2d 442, 447-448 (5th Cir. 1987).

B. The New York child pornography statute upheld in *Ferber* defined "child" to include persons under 16 years of age. 458 U.S. at 751. The 1984 amendments to the federal Act raised the age of majority from 16 to 18. See Child Protection Act of 1984, Pub. L. No. 98-292, § 5(a)(1), 98 Stat. 205. As respondents note (Resp. Br. 36-37), this change was intended in part to "facilitate prosecution and conviction in cases in which the age of the child depicted cannot be proven by positive identification of the child." H.R. Rep. No. 536, 98th Cong., 1st Sess. 7 (1983).[10] Congress was motivated as well, however, by the belief that "[o]n grounds of policy and logic, it seems to us incredible that a 17-year old adolescent is prohibited from drinking, voting or signing a valid contract, yet is permitted to star in a pornographic movie." S. Rep. No.

[10] The House Report explained: "Usually the child who is depicted in child pornography cannot be located. Proof of the child's age has therefore been by circumstantial evidence. This meant that unless the child appeared to have not yet attained puberty (and therefore was definitely under age 16), an offense could not be proven. By raising the age to 18, if the child depicted does not look like an adult, a conviction can be obtained." H.R. Rep. No. 536, *supra*, at 7-8 (1983). See also *id.* at 3 ("Raising the age * * * would facilitate the prosecution of child pornography cases and raise the effective age of the protection of children from these practices, probably not to 18 years of age, but perhaps to 16.").

169, 98th Cong., 1st Sess. 8 (1983) (quoting letter from Gregory A. Loken to Senator Specter).[11]

Congress surely has the constitutional authority to determine that 16- and 17-year-olds require federal protection against sexual exploitation. This Court noted in *Ferber* that a substantial number of state child pornography laws covered persons up to 18 years of age, 458 U.S. at 764 n.17; no Justice in that case expressed doubt as to the validity of such statutes. The Court has subsequently upheld an Ohio child pornography statute that defined "minor" to include all persons less than 18 years old. *Osborne* v. *Ohio*, 495 U.S. 103, 113 n.9 (1990).[12] See also *United States* v. *Freeman*, 808 F.2d 1290, 1293 (8th Cir.) (upholding Section 2256(1) against constitutional challenge), cert. denied, 480 U.S. 922 (1987). Respondents' challenge is therefore without merit.

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[11] The Senate Report noted that "[t]he sponsors of S. 1469 concur with Mr. Loken and believe that the Federal law should be extended to protect children aged 16 and 17." S. Rep. No. 169, *supra*, at 8 (1983).

[12] The Court stated: "We * * * do not find any merit to Osborne's claim that [the Ohio statute] is unconstitutionally vague because it does not define the term 'minor.' Under Ohio law, a minor is anyone under eighteen years of age." 495 U.S. at 113 n.9.

For the reasons stated above, and in the opening Brief for the United States, the judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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JULY 1994